82-1936

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

HUGO RODRIGUEZ,
Petitioner,

VS.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.,
GRANCOLOMBIANA (NEW YORK), INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The question presented is whether the Jones Act and American law are applicable to an injury claim by a foreign seaman employed by a foreign shipowner, where the injury occurred in an American port, the seaman was hospitalized for over three months in an American hospital, and the shipowner had owner's representatives throughout the United States (whose duties included operational procedures), had an operational manager in the United States, derived substantial revenues from United States trade, utilized an American business address and advertised in United States publications, was involved in extensive litigation in the United States, and conducted major business out of New York through its subsidiary, an American corporation.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Hugo Rodriguez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 15, 1983, as to which rehearing was denied April 25, 1983.

OPINIONS BELOW

The Order of Judge Stanley A. Weigel of the United States District Court for the Northern District of California is set forth in Appendix A. The opinion of the Court of Appeals for the Ninth Circuit entered on March 15, 1983, reported at 703 F.2d 1069 (9th Cir. 1983), is set forth in Appendix B. The Order and concurring opinion filed April 5, 1983, is set forth in Appendix C. The Order After

Petition for Rehearing filed April 25, 1983, is set forth in Appendix D. The Order recalling the mandate filed May 2, 1983, is set forth in Appendix E.

JURISDICTION

The Court of Appeals entered its judgment on March 15, 1983. The Order After Petition for Rehearing filed April 25, 1983, affirmed the district court's judgment of dismissal in its entirety.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATUTE INVOLVED

The Jones Act, 46 U.S.C. Section 688, provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury . . . .

STATEMENT OF THE CASE

Plaintiff brought suit under the Jones Act and the general maritime law of the United States for damages arising out of an accident which occurred aboard the Colombian flag vessel *Ciudad de Cali* on May 18, 1979, while the vessel was in the Port of San Francisco. (C.R. 1).[1] Rodriguez was admitted to San Francisco General Hospital on May 18, 1979, and was discharged on August 21, 1979 (C.R. 30). Rodriguez has retained American counsel who could not represent him in Colombia.

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[1]"C.R.," refers to the clerk's record below by docket number.

Plaintiff's discovery revealed that the vessel's voyages have frequent contact with American ports. The itineraries for Flota Mercante Grancolombiana vessels during the calendar year of 1979, which were attached to defendants' responses to plaintiff's second set of interrogatories (C.R. 30), clearly reveal that the vessel, *Ciudad de Cali,* has substantial ties with United States ports, and in fact, its very lifeblood is dependent upon its American contacts. (C.R. 30). Thirteen vessels owned by the defendants deliver merchandise to the United States, and the *Ciudad de Cali* is regularly engaged in extensive commercial operations in the United States (C.R. 29), regularly calling at United States ports, and deriving considerable revenue therefrom.

Interrogatory No. 9 of plaintiff's first set of interrogatories and the defendants' response thereto was as follows: "Is the vessel [i.e., *Ciudad de Cali*] regularly engaged in shipping to and from the United States ports? Yes" (C.R. 30). In defendants' Supplemental Responses to plaintiff's second set of interrogatories, the defendants stated that Flota Mercante Grancolombiana grossed $72,460,335 in 1978 from ships which would ordinarily call at American ports and grossed $93,493,984 in 1979 from ships which called at American ports. (C.R. 30).

The deposition testimony of Carlos F. De Narvaez, owner's representative for Flota Mercante Grancolombiana in San Francisco, reveals that the defendant has owner's representatives in three locations in the United States, who coordinate with local agents the interests of Flota Mercante Grancolombiana, *including operational procedures,* accounting procedures, claims, stevedoring the contracts, repairs, emergency repairs, and purchases. (C.R. 30).

The shipowner, Flota Mercante Grancolombiana, has been involved in extensive litigation in the United States, availing itself of United States courts to prosecute and defend actions. (C.R. 20).[2]

In addition to owner's representatives in the United States, a decision of this Court indicates that Flota Mer-

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[2]Birrer v. Flota Mercante Grancolombiana, 386 F. Supp. 1105 (Oregon 1974); Burrage v. Flota Mercante Grancolombiana, S.A., 431 F. 2d 1229, 1970 AMC 2254 (5th Cir. 1970); Complaint of Flota Grancolombiana, S.A., 440 F. Supp. 704 (S.D.N.Y. 1977); Contorno v. Flota Mercante Grancolombiana, S.A., 278 F. 2d 719 (2d Cir. 1960); Cox v. Flota Mercante Grancolombiana, S.A., 577 F. 2d 798, 1978 AMC 1277 (2d Cir. 1978); Davis v. Flota Mercante Grancolombiana, S.A., 461 F. Supp. 20 (S.D.N.Y. 1978); Erazo v. M/V Ciudad de Neiva and Flota Mercante Grancolombiana, S.A., 270 F. Supp. 211, 1967 AMC 183 (DC Md. 1967); Famous Realty v. Flota Mercante Grancolombiana, 81 F. Supp. 553 (E.D.N.Y. 1948); Flota Mercante Grancolombiana, S.A. v. U.S.A., 1969 AMC 1298 (E.D. La.); Flota Mercante Grancolombiana v. Federal Maritime Com'n., 342 F. 2d 924 (D.C. Cir. 1964); Flota Mercante Grancolombiana, S.A. v. Federal Mar. Com'n., 373 F. 2d 674 (D.C. Cir. 1967); Flota Mercante Grancolombiana v. Federal Maritime Com'n., 302 F. 2d 887 (D.C. Cir. 1962); Flota Mercante Grancolombiana, S.A. v. Vana Trading Co., Inc., 434 U.S. 892, 98 S. Ct. 267, 54 L. Ed. 2d 177 (1977); Gulf Stevedore Corp. v. Flota Mercante Grancolombiana, S.A., 401 F. 2d 537 (5th Cir. 1968); Harrison v. Flota Mercante Grancolombiana, S.A., 577 F. 2d 968, 1979 AMC 824 (5th Cir. 1978); Hill v. Flota Mercante Grancolombiana, S.A., 267 F. Supp. 380 (E.D. La. 1967); Hill v. Flota Mercante Grancolombiana, S.A., 405 F. 2d 878 (5th Cir. 1969); Lattin v. Flota Mercante Grancolombiana, 290 F. Supp. 893, 1968 AMC 585 (D.C. Tex. 1967); Maresco v. Flota Mercante Grancolombiana, S.A., 167 F. Supp. 845 (E.D.N.Y. 1958); Munoz v. Flota Mercante Grancolombiana, 553 F. 2d 837, 1977 AMC 843 (2d Cir. 1977); Russo v. Flota Mercante Grancolombiana, 303 F. Supp. 1404, 1969 AMC 2096 (S.D.N.Y. 1969); Vana Trading Co., Inc. v. S.S. "Mette Skou," and Flota Mercante Grancolombiana, S.A., 556 F. 2d 100 (2d Cir. 1977).

cante Grancolombiana had an "operating manager" in the United States. *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 625 (1966).

Flota Mercante Grancolombiana's arduous avoidance of American law and justice is rather incongruous, since it did not hesitate to utilize the American judiciary in seeking (and obtaining) damages against the United States. Flota Mercante Grancolombiana has availed itself of the American court system in prosecuting an action against the United States, and recovering damages from the United States. *Flota Mercante Grancolombiana, S.A. v. USA,* 1969 A.M.C. 1298, 1300 (E.D. La.). An entity that invokes American jurisdiction when it solicits redress for claimed wrongs should be similarly subject to American jurisdiction when others seek a remedy for the wrongs committed by said entity in this country.

Erazo v. M/V Ciudad de Neiva and Flota Mercante Grancolombiana, S.A., 270 F. Supp. 211, 1967 A.M.C. 183 (D.C. Md. 1967) held that the federal district court had jurisdiction to hear and determine an action in admiralty by a Colombian seaman to recover for personal injuries sustained aboard defendant's vessel while it was in the territorial waters of the United States, although plaintiff was a citizen of Colombia, and defendant vessel owner (Flota Mercante Grancolombiana—*the same defendant as herein*) was a Colombian corporation, the vessel flew the Colombian flag, the seaman signed on the vessel in Colombia, and the employment contract provided that plaintiff could only institute suit in Colombia. Thus, Flota Mercante Grancolombiana has defended an admiralty personal injur-

ies action, in the federal district court, against a Colombian seaman.

The Court of Appeals below stated that "(t)here is no evidence in the record as to whether any operational activities were conducted from the listed premises in 1979" (Appendix B, p.A-10). However, the defendants admit that the duties assigned to United States locations include, *inter alia*, "operational procedures" and "repairs" (C.R. 30). The plaintiff was injured on the vessel while the vessel was in dry dock (Deposition of Carlos F. De Narvaez, p.13) in San Francisco undergoing repairs. Thus, the very transaction involved in plaintiff's injury was controlled, operated, and supervised at a United States office.

The fact that Flota Mercante Grancolombiana utilized an American business address is evidenced in the letterhead of Grancolombiana (New York), Inc., which states: "Please reply to: Flota Mercante Grancolombiana, S.A., 50 California Street, San Francisco, California." (C.R. 34). Additionally, Flota Mercante Grancolombiana is listed in the San Francisco telephone directories. (C.R. 37). Defendants advertise in American publications and publish the schedule for its vessels, including the vessel, *Ciudad de Cali*, which frequently calls at United States ports. (C.R. 39).

Although the shipowner has asserted that Grancolombiana (New York), Inc. is not its subsidiary (Brief For Appellees, 6:19-20), Grancolombiana (New York), Inc. is, in fact, a wholly owned subsidiary of Flota Mercante Grancolombiana, which conducts a substantial base of operations in the United States (Appellant's Reply Brief, 8-9 and Exhibit "A" thereto). The president of Flota Mercante Grancolombiana has his main office in New York, according

to a United States Department of State telegram. (Appellant's Petition For Rehearing, 2-3 and Exhibit "A" thereto).

The plaintiff moved for an order denying application of forum non conveniens and determining Jones Act jurisdiction, and defendants moved to dismiss for lack of jurisdiction and on the ground of forum non conveniens. The district court denied plaintiff's motion and granted defendants' motion to dismiss (Appendix A).

The Court of Appeals affirmed in an opinion which stated that jurisdiction based upon the occurrence of the injury in the United States "is devoid of merit" (Appendix B, p. A-8) and that "(t)he uncontradicted evidence in this matter establishes that Flota's 'base of operations' was in Bogota, Colombia and not in the United States." (Appendix B, p. A-9). While acknowledging that Rodriguez placed heavy reliance on *Fisher v. Agios Nicolaos V.*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816 (1981) and *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981), the Court of Appeals concluded that both cases are inapposite and refused to address said cases and apply them to the instant factual scenario (Appendix B, pages A-11, A-12). Judge Kennedy, writing a concurring opinion, failed to see how *Phillips* could be inapplicable and stated that the "case is directly in point for us here" (Appendix C, p. A-17). In addition, the concurring opinion cited *Fisher* without discussion. (Appendix C, p. A-17)

Rodriguez petitioned for rehearing, arguing that material facts were overlooked, that the Ninth Circuit's determination that *Fisher* and *Phillips* were inapposite was completely misplaced, and that the "substantial contacts"

theory in *Bartholomew*—generally accepted as the operative choice of law principle in Jones Act cases—was not applied by the Court. The Court of Appeals denied a rehearing, without opinion or comment (Appendix D). The Ninth Circuit has rejected the substantial contacts approach and has applied a preponderance of American contacts test that is contra to *Bartholomew* and *Fisher* and the tenor of *Rhoditis*, which was intended to expand jurisdiction under the Jones Act and the general maritime law.

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari should be granted because the Court of Appeals has:

1. Rendered a decision in this case in conflict with decisions on the same matter of other Courts of Appeal, including those of the Second, Fifth and Eleventh Circuits, which have applied widely divergent approaches, from the substantial contacts test of the Second Circuit to the minimum contacts test of the Fifth Circuit, in sharp contrast to the preponderance of contacts test employed by the Ninth Circuit, and

2. Decided an important and frequently occurring question of federal law which has not been, but should be, settled by this Court.

Background

Any discussion concerning foreign seamen suing for personal injuries under American law must begin with *Lauritzen v. Larsen,* 345 U.S. 571 (1953), in which this Court established a methodology to determine the applicability of the Jones Act in cases where more than one nation might claim an interest. Seven factors, which were to be

considered, were set forth in *Lauritzen.* (Appendix B, p. A-6). In *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970), it was held that these factors were not intended to be exhaustive[3] and that an additional factor of importance in determining whether the Jones Act is applicable is an extensive business operation in this country. 398 U.S. at 309, 310. Justice Douglas enunciated an expansive approach to jurisdiction under the Jones Act:

> The *Hellenic Hero* was not a casual visitor; rather, it and many of its sister ships were earning income from cargo originating and terminating here. We see no reason whatsoever to give the Jones Act a strained construction so that this alien owner, engaged in an extensive business operation in this country may have an advantage over citizens engaged in the same business by allowing him to escape the obligations and responsibility of a Jones Act "employer".

Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310 (1970).

THE CONFLICTS

The circuit courts have established various tests regarding the quantum of American contacts necessary to trigger application of the Jones Act. In *Bartholomew v. Universe Tankship, Inc.,* 263 F.2d 437 (2d Cir. 1959), *cert. denied* 359 U.S. 1000 (1959), Judge Medina formulated the following "method of approach" to the problem: "[S]omething between minimal and preponderant contacts is necessary if the Jones Act is to be applied. Thus we conclude that the test is that 'substantial' contacts are necessary." 263 F.2d at 440. A law review author states that *Bartholomew* requires Jones Act application if *a* substantial contact is found:

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[3]398 U.S. at 309; Appendix B, p. A-7.

> Thus, one or two particularly important local contacts may outweigh a numerical majority of foreign contacts. In fact, one prestigious Second Circuit opinion, *Bartholomew v. Universe Tankships, Inc.*, held that "substantial contacts" were all that was needed, and that as soon as a substantial contact was found, a court should stop its deliberations and proceed to apply the Jones Act to the case before it.
>
> Carlson, *The Jones Act and Choice of Law*, 15 Int'l Law, 49, 52 (1981).
>
> A review of the case law makes it apparent that "the substantial contacts" theory in *Bartholomew* is generally accepted as the operative choice of law principle in Jones Act cases. . . .
>
> *Id.* at 72.

The concurring opinion cites *Bartholomew* approvingly (Appendix C, p. A-17); however, the "substantial contacts" test, requiring the application of the Jones Act when a substantial contact is found, has not been followed by the Ninth Circuit in this case. Interestingly, Justice Nelson remarked at oral argument that the contacts of Flota Mercante Grancolombiana with the United States were "impressive"; and indeed, the facts herein reveal substantial contacts of Flota Mercante Grancolombiana with the United States.

In *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980) *cert. denied*, 454 U.S. 816 (1981), the surviving widow and dependents of a Greek seaman who was killed on a foreign vessel in an American port brought a wrongful death action under the Jones Act and under the general maritime law. The district court held that the Liberian

corporation which owned the vessel and the Panamanian corporation which operated the vessel were liable, and they appealed. Despite defendants' strong case for the application of Greek law,[4] where the accident occurred in an American port and the vessel derived substantial revenues from operations in the United States,[5] the Fifth Circuit held that there was a sufficient nexus between the defendants and the United States to justify application of United States law.[6]

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[4]The defendants make an extremely strong case for application of Greek law. They point out that the ship flew a Greek flag and had Greek registry, that the deceased seaman was of Greek nationality and had signed his employment contract in Greece, and that the law of the American forum should not be applied simply because the accident occurred in an American port.

They also point out that the defendants, although a Liberian corporation (the owner) and a Panamanian corporation (the operator), were owned entirely by three Greek shareholders. They rely additionally upon the circumstance that the decendent's survivors had a remedy (in the nature of workmen's compensation, as in *Lauritzen*) available to them in the Greek courts.

The district court held, however, that it was instead appropriate to apply United States law to the consequences of this accident in an American port . . .

628 F. 2d at 316-317.

[5]Here, under the findings, substantial revenues were derived from a substantial base of operations in the United States.

628 F. 2d at 317.

[6]We thus do not find merit to the defendants' argument that the district court erred in its conclusion of *law* that United States law may apply to this foreign seaman's accident in a United States port, where the vessel had a substantial base of operations in the United States and its owners derived substantial revenues from United States trade. Under *Rhoditis* and subsequent jurisprudence, there was a sufficient nexus between the defendants and this country so as to justify the application of United States law.

628 F. 2d at 317-318.

Thus, *Fisher* holds that even a single call to pick up cargo in an American port by a foreign vessel owned and operated by Greek citizens, flying the Greek flag, carrying a Greek crew, and directed solely out of Greece, established a substantial base of operations in the United States, as required by *Rhoditis*, permitting application of the Jones Act and American law where the foreign seaman was injured in an American port.[7] A law review commentator has characterized the requirement set forth in *Fisher* as one of the minimum contacts.[8]

The Ninth Circuit has held that the Jones Act does not apply in a case where the ship was anchored off the coast of Trinidad, the ship had worked exclusively offshore of Trinidad for six years before the accident, and the ship had been conducting a substantial and rather permanent operation off the Trinidad coast under a license from the Trinidad government. *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980) *cert. denied*, 451 U.S. 920 (1981). Although the Ninth Circuit acknowledged that the Jones Act and American law could be based upon the pres-

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[7]49 U.S.L.W. 3941.

[8]Although the panel remarked in a footnote that "doing *any* amount of busiess in a U.S. port, however minor," is not enough to justify the application of American law, a consideration of the "contacts" involved in *Fisher* leaves little doubt that the *Fisher* court's "contacts" requirement is indeed minimal.

Leefe, *Forum Non Conveniens, Choice of Law and the Foreign Seaman: The Fifth Circuit Makes a Choice*, 27 Loyola L. Rev. 309, 318 (1981).

The court's focal point was clearly the defendant shipowner's contacts with the United States; these were minimal indeed.

Id. at 318-319.

ence of one or more contacts with the United States,[9] the importance of the situs of liability, and the strong national interest of applying American law to activities within American territory,[10] it nevertheless applied a preponderance of American contacts test.

A law review Comment has pointed out that *Phillips'* preponderance of American contacts test is contra to be substantial contacts requirement of *Bartholomew* and *Rhoditis*. The Ninth Circuit's application of a restrictive preponderance test herein is contra to the intent of *Rhoditis* and the modern trend to expand jurisdiction under the Jones Act and the general maritime law.

> Finally, the Ninth Circuit Court of Appeals has employed the base of operations test in rejecting the law of the flag as the principal factor for determining Jones Act jurisdiction. In *Phillips v. Amoco Trinidad Oil Co.*, various Trinidad oil workers brought suit

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[9]There is little doubt that sufficient American interest in a particular transaction can rest on the presence of one or more important contacts between that transaction and this country.

632 F. 2d at 86.

[10]Plaintiffs place great weight on the statement in *Rhoditis* that "[t]he significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction," 398 U.S. at 309, 90 S.Ct. at 1734 (footnote omitted). We agree that the *Lauritzen* factors should be applied with sensitivity to the national interest that may be served by the assertion of American maritime law in a particular case.

632 F. 2d at 85.

The *Lauritzen* case recognizes that the most commonly accepted basis in international law for selecting tort rules of decision is by reference to the place where the liability arose. This reflects the strong interest of a nation in the activity which goes on within its sovereign territory.

632 F. 2d at 87.

under American law, including the Jones Act, for injuries sustained during exploratory drilling in Trinidad territorial waters.

. . .

Analyzing the choice of law issue, the Ninth Circuit rejected the substantial contacts approach, where the only relevant inquiry is whether the American contacts are substantial, and proceeded to weigh and balance the American contacts against the Trinidad contacts. . . . Moreover, *Phillips* appears to require a preponderance of American contacts before exercising jurisdiction; such a requirement is inconsistent with the substantial contacts test adopted in both *Bartholomew* and *Rhoditis*. . . . It is ironic that Justice Douglas' opinion in *Rhoditis*, which was intended to expand jurisdiction under the Jones Act and the general maritime law, has become the centerpiece of a liberal *forum non conveniens* rule.

Klick, *Jurisdiction, Choice of Law, and Forum Non Conveniens In A Personal Injury Suit by A Foreign Seaman: The Application of Interest Analysis*, 5 Maritime Lawyer 239, 252-3 (1980).

In a recent suit under the Jones Act, the Eleventh Circuit held that substantial business operations and revenues in this country justified the choice of the Jones Act and application of American law, notwithstanding the fact that *all* seven *Lauritzen* criteria were foreign.[11] *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983).

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[11]The defendant complains however that the "contacts" in this case are substantially less than those in other cases in which the courts have not permitted an alien seaman to maintain his action in the United States against an alien shipowner. For instance, in applying the *Lauritzen* criteria to this case, defendant points out

The district court stated that there was sufficient contacts to justify the retention of Jones Act jurisdiction and the application of American law and that such conclusion was based upon substantial business in United States ports and plaintiff's treatment for his medical condition in the United States.

> After noting that the criteria listed in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L. Ed. 1254 (1953), as supplemented by *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L. Ed. 2d 252 (1970) did not neatly fit this case, the district court concluded 'that sufficient contacts were adduced to justify retaining jurisdiction over this cause and to make the application of American Law appropriate under the circumstances of this case. *This conclusion is based upon a finding that the defendants conducted substantial business in United States ports and that plaintiff was treated for his medical condition in the United States* while serving aboard defendant's vessel and in their employment.'
>
> *Szumlicz*, at 1194-5 (Emphasis Added).

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that (1) the place of the wrongful act occurred aboard the vessel while it was on a voyage between San Juan, Puerto Rico and Fort Lauderdale, Florida, where plaintiff went ashore and was hospitalized; (2) the law of the flag was Norwegian; (3) plaintiff was domiciled in Poland; (4) the shipowner was Norwegian; (5) the place of contract was Norway and Germany; (6) a forum was accessible in Norway; (7) the law of the forum was Norway. But this argument omits the *Rhoditis* gloss on *Lauritzen* factors—the "substantial use of a United States base of operations for the shipping and *revenues of the vessel and its owner*, together with the other United States contacts," which *justified the choice of the Jones Act* and of general maritime law as administered by our courts as a more appropriate basis for decision than the Norwegian compensation law. *Fisher, supra*, at 317.

Szumlicz, at 1195-6 (Emphasis Added).

Similarly herein, defendants conducted substantial business in United States ports and plaintiff was treated for his medical condition in the United States.

PUBLISHED OPINION OF NINTH CIRCUIT SETS FORTH FLAGRANTLY INCORRECT STATEMENTS OF LAW

The opinion of the Ninth Circuit, reported at 703 F.2d 1069 (9th Cir. 1983), presents the bench and bar with flagrantly incorrect statements of law. Amazingly, the Court below states that *Fisher* and *Phillips* are inapposite herein and that no issue was raised in either case as to the Court's jurisdiction of the subject matter under the Jones Act (Appendix B, pages A-11, A-12). Compounding this erroneous statement, the Court considered the impressive amount of income grossed by Flota Mercante Grancolombiana's vessels in calling on United States ports as irrelevant in determining Jones Act jurisdiction.[12] In *Rhoditis,* this Court emphasized that the *Hellenic Hero* (like the *Ciudad de Cali* herein) was not a casual visitor and that it and many of its sister ships were earning income from cargo originating and terminating here.[13]

The Ninth Circuit claims that the fact that Flota Mercante Grancolombiana has been involved in litigation in

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[12]The fact that Flota's vessels have grossed an impressive amount of income in calling on ports of the United States does not prove that Flota's base of operations is in the United States. We have not been referred to any case which has established Jones Act jurisdiction based on the dollar amount derived by a foreign shipowner from his shipments to and from United States ports.

(Appendix B, p. A-9).

[13]*Rhoditis,* 398 U.S. at 310.

the United States is irrelevant as a contact with this country since there is no authority for such a contention (Appendix B, p. A-12). However, *Rhoditis* held that the factors enumerated in *Lauritzen* were not intended to be exhaustive.[14] It is submitted that utilization of the American judiciary to prosecute and defend actions, including a personal injury action by a Colombian seaman,[15] represents a significant contact with this country.

CONCLUSION

This Court denied certiorari in *Fisher*, thereby permitting the ruling to stand that even a single call to an American port by a foreign vessel was tantamount to a substantial base of operations in the United States, providing for application of American law and Jones Act jurisdiction in a case where the foreign seaman was injured in an American port. In light of *Fisher*, it is clear that Rodriguez has stated a claim under the Jones Act.

The obvious conflict among the circuits and the pressing need for Supreme Court review of this area of law has been observed by a law review commentator, as follows:

> The *Fisher* decision demonstrates the inconsistency fostered by the *Rhoditis* Court's "almost parenthetical remarks . . . that a court decides choice of law questions by considering unenumerated 'factors' in a 'test' of United States contacts." It is submitted that the third, ninth and possibly second circuits would have reached a different choice of law decision on the facts of the noted case. *This current lack of uniformity among the circuits as to criteria to be applied to admir-*

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[14] 398 U.S. at 309.

[15] *Erazo v. M/V Ciudad de Neiva and Flota Mercante Grancolombiana, S.A.*, 270 F. Supp. 211, 1967 AMC 183 (D.C. Md. 1967).

> *alty choice of law determinations, suggest the need for Supreme Court review of this area of the law.*

Leefe, *Forum Non Conveniens, Choice of Law and the Foreign Seaman: The Fifth Circuit Makes a Choice,* 27 Loyola L. Rev. 309, 320 (1981) (Emphasis Added).

For the foregoing reasons, we respectfully submit that this Court should grant a Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Dated:

Respectfully submitted,

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Hugo Rodriguez

(Appendices follow)

Appendix A

United States District Court
Northern District of California
C 79-2316 SAW
Hugo Rodriguez,
Plaintiff,
vs.
Flota Mercante Grancolombiana, S.A.,
Grancolombiana (New York), Inc.,
Defendants.
[Filed Aug. 18, 1981]

ORDER

Plaintiff moves for an order denying application of forum non conveniens and determining Jones Act, 46 U.S.C. § 688, jurisdiction. Defendants move to dismiss for lack of jurisdiction and on the ground of forum non conveniens. Defendants' motion is a renewal of a substantially similar motion which they made in 1979. By order of November 13, 1979, this court found that defendants' prior motion was premature and allowed plaintiff to pursue necessary discovery. That discovery is now complete and the matter is ripe for decision.

IT IS HEREBY ORDERED that plaintiff's motion is denied.

IT IS FURTHER HEREBY ORDERED that defendants' motion to dismiss is granted and

IT IS FURTHER HEREBY ORDERED that this action is dismissed.

Dated: August 18, 1981

/s/STANLEY A. WEIGEL
Judge

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 81-4455
D.C. No. C-79-2316-SAW

Hugo Rodriguez,
Plaintiff-Appellant,

v.

Flota Mercante Grancolombiana, S.A.,
Grancolombiana (New York), Inc.,
Defendants-Appellees.

OPINION

Appeal from the United States District Court
for the Northern District of California
Stanley A. Weigel, District Judge, Presiding
Argued and submitted May 14, 1982

[Filed Mar. 15, 1983]

Before: KENNEDY, ALARCON, and NELSON, Circuit Judges

ALARCON, Circuit Judge:

Hugo Rodriguez, (Rodriguez) a seaman, appeals from the district court's order dismissing his complaint brought under the Jones Act,[1] and the general maritime law, to recover damages for injuries caused by his employer's

[1]The Jones Act, 46 U.S.C. § 688, provides in relevant part, "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . ."

negligence. We must decide whether the facts establish that the court had subject matter jurisdiction.[2] We conclude that the district court was correct in determining that it lacked subject matter jurisdiction under the Jones Act. Flota Mercante Grancolombiana, S.A., (Flota) is not an employer within the scope of the Jones Act. We reverse and remand for a determination of the sufficiency of the claim brought pursuant to the general maritime law, and, if so, whether in the exercise of the district court's discretion, jurisdiction should be retained.

I. *DISPOSITIVE ISSUES*

Rodriguez contends that the facts presented to the district court established its jurisdiction to hear his Jones Act claim against Flota.

We are told that presence of the following factors satisfied all jurisdictional requirements.

One. Rodriguez was injured while working as a seaman on Flota's vessel in the port of San Francisco, within the territorial waters of the United States.

Two. Flota had substantial operational contacts within the United States to render Flota an employer within the Jones Act.

Three. The fact that Flota has been involved in a number of lawsuits in the United States as a plaintiff or defendant "is an indicium of its business relations and contact with the United States."

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[2]The determination of whether subject matter jurisdiction exists is a question of law. We must thereby apply a *de novo* standard of review. *See Bank of California, N.A. v. Opie*, 663 F.2d 977, 979 (9th Cir. 1981).

II. *PERTINENT FACTS*

Rodriguez was injured on May 18, 1979 on the Ciudad De Cali, while the vessel was in the port of San Francisco. He received medical treatment at a hospital in the city of San Francisco.

Rodriguez is a Columbian citizen and resides there. His employment contract with Flota was signed in Colombia. The contract provides that the parties recognize the jurisdiction of the Columbian courts over any matter that might arise from the contract. The agreement also provides that the law of Columbia shall apply.

Flota is the owner of the Ciudad De Cali. The Ciudad De Cali is registered in Columbia and flies a Columbian flag. The vessel's home port is also in Columbia.

Flota is a Columbian corporation headquartered in Bogota, Columbia. Eighty percent of Flota is owned by Columbian interest and 20 percent is owned by Equadorian interests. All of Flota's officers and managers reside in Columbia. All of its business matters and operations are centered in Bogota. In 1979, Flota owned 29 vessels. Thirteen Flota ships called at United States ports during that year. The Ciudad De Cali called on 15 ports in 1979; four of these were in the United States. During the Ciudad De Cali's 72-day round trip voyage from Columbia to North America, six days were spent in United States ports.

In 1979, Flota grossed $93,493,984 dollars from the call of its vessels in United States ports.

In 1979 Flota had a contract with Grancolombiana (New York), Inc. (Granco) a New York corporation, to service its shoreside needs in the United States. Two of Granco's

employees served as Flota's owners representatives. The duties of the owner's representatives are to husband vessels in United States ports.

III. *DISCUSSION*

We begin our discussion with a statement of the relevant law and procedure which must be applied when a challenge is raised to the jurisdiction of a district court in a Jones Act matter.

A. *Pleading Subject Matter Jurisdiction Under the Jones Act*

A complaint which is "drawn so as to claim a right to recover under the Constitution and laws of the United States" states a cause of action. *Bell v. Hood*, 327 U.S. 678, 681 (1946). A tort claim under the Jones Act is properly plead if it contains allegations that the injured person is a seaman who was acting within the scope of his employment when he was injured. *Gebhard v. S.S. Hawaiian Legislator*, 425 F.2d 1303, 1308 (9th Cir. 1970). No issue has been raised as to the sufficiency of the pleading under the *Gebhart* test. Rodriguez alleged that he was injured as the result of Flota's negligence while performing an activity within the scope of his employment as a seaman.

B. *Jurisdictional Defense to Jones Act Claim*

An assertion by a seaman that the Jones Act affords him the right to recover damages for injuries resulting from the negligence of his employer is sufficient to empower the district court to assume jurisdiction over the case and "to determine whether it was or was not well founded in law and fact." *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953).

The failure to state a claim under the Jones Act is not the equivalent of the lack of subject matter jurisdiction. "It is well established that failure to state a proper claim calls for a judgment on the merits and not a dismissal for want of jurisdiction." *Bell v. Wood,* 327 U.S. 673, 682 (1946). The fact that a complaint states a cause of action should not however, be confused with the question of whether jurisdiction exists over the subject matter. *See Montana-Dakota Utilities Co. v. Northwestern Public Service Co.,* 341 U.S. 246, 249 (1951). Upon a proper showing, a district court may dismiss a complaint for lack of subject matter jurisdiction if the shipowner is not an " 'employer' for Jones Act purposes." *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306, 308-309 (1970).

Where a defendant in an action brought under the Jones Act claims that the court lacks jurisdiction over the subject matter, on the grounds that he is not an employer subject to liability under the statute, the plaintiff must show that the shipowner has substantial contacts with the United States so as to be considered an employer subject to statutory liability in an American court. *See, e.g., id.* at 310.

In *Lauritzen,* the Supreme Court stated that the following factors should be considered on determining whether a particular shipowner should be held to be an "employer" under the Jones Act: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. 345 U.S. at 583-91.

In *Rhoditis,* the Supreme Court noted that the seven factors set forth in *Lauritzen* were not intended to be exhaustive and that an additional factor of importance in determining whether the Jones Act is applicable is the shipowner's base of operations. 398 U.S. at 309.

C. *Law of the Place of the Wrongful Act versus The Law of the Flag*

Rodriguez argues that the district court had jurisdiction over the shipowner, in spite of its Colombian registry and flag because Rodriguez was injured in the port of San Francisco. A similar issue was presented to the Supreme Court in *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959).

In *Romero,* a Spanish seaman was injured in United States territorial waters while aboard a ship of Spanish registry, flying a Spanish flag. The district court dismissed the action under the Jones Act for lack of jurisdiction on the ground that the Act provided no right of action for an alien seaman against a foreign shipowner under these circumstances. The Supreme Court affirmed the dismissal of the seaman's Jones Act against the shipowner. The Court refused to apply the law of the place of the wrongful act or omission. The court reasoned as follows:

> Although the place of injury has often been deemed determinative of the choice of law in municipal conflict of laws, such a rule does not fit the accommodations that become relevant in fair and prudent regard for the interest of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations. To impose on ships the duty of

> shifting from one standard of compensation to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce without basis in the expressed policies of this country. The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury.

Id. at 384.

Thus, Rodriguez' claim that the district court erred in dismissing this matter because the injury to a Colombian seaman on a vessel flying a Colombian flag, occurred in San Francisco is devoid of merit under *Romero.*

D. *Base of Operations*

Rodriguez urges us to reverse the district court because he views the facts as showing that Flota's base of operations was in the United States. He points to the following facts as proof that Flota's base of operations was in the United States.

1. $93,493,984.00 in gross income derived from ships which called on the United States in 1979.

2. "[V]irtually all of the Ciudad Cali's voyages in 1979 have had contact with American ports . . . ." Appellant's Opening Brief at 13.

3. Flota had three owner's representatives in the United States.

4. In 1966 Flota had an operating manager in the United States.

5. Thirteen of Flota's vessels regularly call on United States ports.

6. "The letterhead of Grancolombiana, New York, Inc., includes a section which states: Flota Mercante Grancolombiana S.A., 50 California Street, San Francisco, California." Appellant's Opening Brief at 30.

7. Flota is listed in the San Francisco telephone directories and advertises in American publications.

The uncontradicted evidence in this matter establishes that Flota's "base of operation" was in Bogota, Colombia and not in the United States. Its officers and managers reside in Bogota. All of its business decisions are made in Bogota and then transmitted to its agents or owner representatives in foreign ports. Its vessels began and end their voyages in Colombia. The fact that it has agents in the United States to husband its vessels while in American ports is of no significance in determining Flota's base of operations. *See Merren v. A/S Borgestad,* 519 F.2d 82, 83 (5th Cir. 1975). The fact that Flota's vessels have grossed an impressive amount of income in calling on ports of the United States does not prove that Flota's base of operations is in the United States. We have not been referred to any case which has established Jones Act jurisdiction based on the dollar amount derived by a foreign shipowner from his shipments to and from United States ports. It does not appear logically relevant to us that a foreign shipowner's base of operations depends upon the financial success of its shipments to or from another country. The fact that a foreign shipowner has a mailing address in the United States and is listed in telephone directories is not proof that its base of operations is in

this country. There is no evidence in the record as to whether any operational activities were conducted from the listed premises in 1979.

Each of the cases relied upon by Rodriguez as support for his view that Flota's base of operations was in the United States is readily distinguishable.

In *Rhoditis,* the shipowner was a Greek corporation. However, it had its largest office in New York and a second office in New Orleans. More than 95 percent of its stock was owned by a United States domiciliary who resided in Connecticut and had been in the United States for 25 years. He managed the corporation out of New York. 345 U.S. at 307-08. Under these facts the Supreme Court found that the shipowner was engaged in extensive business operations in this country. *Id.* at 310. No parallel facts appear on the record before this court.

In *Moncada v. Lemuria Shipping Corp.,* 491 F.2d 470 (2d Cir.), *cert. denied,* 417 U.S. 947 (1974), the court noted that "Jones Act jurisdiction exists only where there are substantial contacts between the transaction involved in the case and the United States . . . ." *Id.* at 472. In *Moncado,* Americans owned all of the stock of the shipowner. In addition, all the officers of the shipowner were American. The shipowners base of operations was in the United States. *Id.* at 473. The court concluded that these facts established substantial contacts with the United States. *Id.* In the matter *sub judice* no American owns stock in the shipowner or is a member of its management team.

Merren, 519 F.2d at 82, has been cited to us for the proposition that "maintenance of offices or organizational

affiliation in the United States was a significant factor" in determining whether the district court has subject matter jurisdiction over a shipowner under the Jones Act. Appellant's Opening Brief at 15. The *Merren* case provides no support for Rodriguez's cause. The court in *Merren* affirmed the district court's order granting a summary judgment on jurisdictional grounds. The court noted that "except to the extent of having shipping agents who contracted in American ports for the use of the ship's services" the shipowner maintained no offices and no affiliation with any organization in the United States. *Id.* at 83. In the matter before us, Flota's only affiliation with any organization was to maintain owner's representatives whose sole concern was the husbanding of its vessels and contracting for their services.

In his opening brief, Rodriguez tells us that in *Gkiafis v. Steamship Yiosonas,* 387 F.2d 460 (4th Cir. 1967) the Fourth Circuit "was impelled to reverse the district court which had dismissed a personal injury suit brought under the general maritime law and Jones Act." Appellant's Opening Brief at 19. We have read *Gkiafis.* In fact, the Fourth Circuit *affirmed* the dismissal of the Jones Act claim for failure to state a cause of action. 387 at 461-62.

Rodriguez places heavy reliance on *Fisher v. Agios Nicolaos V,* 628 F.2d 308 (5th Cir. 1980), *cert. denied,* 454 U.S. 816 (1981). Rodriguez also directs our attention to *Phillips v. Amoco Trinidad Oil Co.,* 632 F.2d 82 (9th Cir. 1980), *cert. denied,* 451 U.S. U.S. 920 (1981). Both cases are inapposite to the problem we must resolve. In both *Fisher* and *Phillips,* this court was presented with a choice of law problem. No issue was raised in either case as to the court's

jurisdiction of the subject matter under the Jones Act. Thus, neither *Fisher* nor *Phillips* provides assistance to us or Rodriguez in resolving the question of the district court's Jones Act jurisdiction of this matter.

The remaining cases cited by Rodriguez, *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981) (per curiam); *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1714 (1982); *Antypas v. CIA. Maritima San Basilio, S. A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977), are each concerned with the application of the doctrine of *forum non conveniens* to the particular facts of each case. They shed no light on the issue of subject matter jurisdiction under the Jones Act.

E. *Effect of the Use of the Courts of the United States by Flota*

Without citation to any authority, Rodriguez suggests that the fact that Flota has been involved in litigation in the United States is a significant contact with this country. None of the enumerated cases involve alleged Jones Act violations. We fail to see their relevance to the matter at hand.[3]

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[3]Rodriguez also argues that the Colombian forum is not convenient to him because his physicians and medical records are in the United States, and he has retained American counsel who could not represent him in Colombia. Convenience of the witnesses and the attorney are not factors cited by the Court in *Lauritzen* and *Rhoditis* as determinators of the Jones Act jurisdiction. Although these factors "might be a persuasive argument for exercising a discretionary jurisdiction to adjudge a controversy . . . it is not persuasive as to the law by which it shall be judged." *Lauritzen*, 345 U.S. at 589-90. Thus, the costs and loss of time entailed in

We conclude that plaintiff has failed to demonstrate that the shipowner, had sufficient contacts with the United States in 1979 to make Flota an employer under the Jones Act so as to give the district court subject matter jurisdiction over Rodriguez's claim.

IV. *THE GENERAL MARITIME LAW CLAIM AND FORUM NON CONVENIENS*

Rodriguez sought damages for his injuries under the Jones Act and under the General Maritime Law before this court. Rodriguez asked us to determine "[w]hether the district court erred in dismissing the action for lack of Jones Act jurisdiction . . ." in the district court, however, Flota requested that the district court dismiss this action "either on the ground that this Court does not have subject matter jurisdiction, or on the basis of *forum non conveniens.*"

The district court's order dismissing this action fails to specify whether its action was compelled by lack of subject matter jurisdiction or because it had determined that the doctrine of *forum non conveniens* was applicable. The order simply states that "the defendant's motion to dismiss is granted."

As discussed above, we have concluded that the district court did not have subject matter of the jurisdiction of the cause of action based on the Jones Act. We cannot discuss from the court's cryptic order whether the district court concluded that it lacked subject matter jurisdiction under

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deposing the medical witnesses and sending the records and the American attorney to Columbia while relevant to the issue of *forum non conveniens* are not relevant factors in determining whether Jones Act jurisdiction is present.

the General Maritime or if, instead, it determined not to exercise its jurisdiction under *forum non conveniens* consideration. It is our view that the district court should determine, in the first instance, whether a proper claim has been pleaded under the General Maritime Law and the applicability of the doctrine of *forum non conveniens.*

CONCLUSION

The dismissal of the cause of action pleaded under the Jones Act is AFFIRMED. The dismissal of the second cause of action is REVERSED. The cause is remanded for a determination of the sufficiency of the remaining claim under the General Maritime Act in its sound discretion, and whether retention of jurisdiction is appropriate under forum non conveniens principles.

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 81-4455

Hugo Rodriguez,
Plaintiff-Appellant,
vs.
Flota Mercante Grancolombiana, S.A.,
Grancolombiana (New York), Inc.,
Defendants-Appellees.

ORDER
[Filed April 5, 1983]

Appeal from the United States District Court
for the Northern District of California

Before: KENNEDY, ALARCON, and NELSON, Circuit Judges.

The concurring opinion in this case was not previously transmitted to the parties. Accordingly, the appellant will be permitted to supplement the petition for rehearing, if he chooses to do so. Any supplemental memoranda in support of the petition should be filed on or before April 14, 1983. If no supplemental statement is deemed necessary, the appellant's counsel should notify the clerk's office so that the panel can rule promptly on the petition for rehearing.

Re: *Rodriguez v. Flota Mercante Grancolombiana, S.A.*
No. 81-4455

KENNEDY, Circuit Judge, concurring:

I concur in the judgment, but write separately to call attention to a conceptual problem in these cases, namely,

whether to characterize an unsuccessful Jones Act claim as lacking in subject matter jurisdiction or as failing to state a cause of action. The majority opts for the first category, and has precedent for it, since the Supreme Court in *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306, 308 (1970), stated, "[o]f the seven factors (relating to Jones Act coverage) . . . four are in favor of the shipowner and against *jurisdiction.*" (Emphasis added.) I suggest, however, that this was only a passing and unguarded remark.

The real question in these cases is not one of subject matter jurisdiction but simply whether or not there has been a failure to state a claim for relief under the Jones Act. The Supreme Court expressly recognized this analysis in *Lauritzen v. Larsen,* 345 U.S. 571 (1953), the leading case on the multi-factor test for determining what law should apply to an accident containing both "foreign" and "domestic" elements. There the court dismissed the case for failure to state a claim under the Jones Act. It expressly rejected the defendant's suggestion that it dismiss the case for lack of subject matter jurisdiction, stating:

> As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact.

Id. at 575.

Later Supreme Court and lower court decisions have usually employed the *Lauritzen* test in the same fashion. *See Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959); *Koupetoris v. Konkar Intrepid Corp.,*

535 F.2d 1392 (2d Cir. 1976); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959); *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240 (3d Cir. 1980); *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5th Cir. 1981); *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980); *Merren v. A/S Borgestad*, 519 F.2d 82 (5th Cir. 1975). In light of these authorities, I suggest the appropriate analysis in these cases should be to ask whether there is a failure to state a claim.

Unfortunately, the present case renders this more than a disagreement over semantics. The majority appears to hold that by labeling this a "subject matter jurisdiction" case, we are somehow prevented from considering such important precedents in our own court as *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980). The *Phillips* case is directly in point for use here, and in fact supports our judgment. It should not be pushed aside because it is a choice of law case or failure to state a claim case. In fact the issue is whether or not there is a failure to state a claim, and we resort to standard choice of law principles to answer that question. The majority itself, in the case before us, cites the same factors as *Phillips* did, namely the *Lauritzen* case, so I fail to see how *Phillips* can be inapplicable. The trouble ends where it tarted, namely by calling this a jurisdictional matter, when failure to state a claim is the real issue.

Appendix D

United States Court of Appeals
For the Ninth Circuit

No. 81-4455

Hugo Rodriguez,
Plaintiff-Appellant,

vs.

Flota Mercante Grancolombiana, S.A.,
Grancolombiana (New York), Inc.,
Defendants-Appellees.
Appeal from the United States District Court
for the Northern District of California

ORDER AFTER PETITION
FOR REHEARING
[Filed April 25, 1983]

Before: KENNEDY, ALARCON, and NELSON, Circuit Judges.

Appellant's request that this matter not be remanded is granted. The judgment of the district court is affirmed in its entirety. The petition for a rehearing is denied. The mandate shall issue now.

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 81-4455
D.C. No. C-79-2316
Northern Cal.

Hugo Rodriguez,
Plaintiff-Appellant,

vs.

Flota Mercante Grancolombiana, S.A.,
Grancolombiana (New York), Inc.,
Defendants-Appellees.

ORDER
[Filed May 2, 1983]

The mandate in this case is recalled. Issuance of the mandate is stayed until June 13, 1983. In the event that appellant files a petition for writ of certiorari to the United States Supreme Court, this stay will continue pending the final disposition of the case by the United States Supreme Court.

For the Court:

Phillip B. Winberry
Clerk of Court

By: /s/ Roger T. Ritter
Roger T. Ritter
Senior Deputy Clerk

No. 82-1936

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

HUGO RODRIGUEZ,
Petitioner,

vs.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
GRANCOLOMBIANA (NEW YORK), INC.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is the Jones Act (Title 46, U.S. Code § 688) and the General Maritime Law of the United States applicable to a dispute which has no substantial contacts with the United States?

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TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 82-1936

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

HUGO RODRIGUEZ,
Petitioner,

vs.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.
GRANCOLOMBIANA (NEW YORK), INC.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Flota Mercante Grancolombiana, S.A. and Grancolombiana (New York), Inc. respectfully request that this Court refuse to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this matter.

STATEMENT OF THE CASE

Petitioner, a Colombian seaman, has filed suit for injuries arising out of an accident which occurred while he was employed aboard the Colombian flag vessel, *Ciudad de Cali*, on May 18, 1979. Respondent Flota Mercante Grancolombiana, S.A. (hereinafter "Flota") is a Colombian corporation, owner of the vessel, and employer of the petitioner.

Respondent Grancolombiana (New York) Inc. (hereinafter "Granco") is a New York corporation which acts as general agent for Flota, assisting in providing necessary services to Flota's vessels while they are in U.S. ports.

At the time of petitioner's accident the vessel was in San Francisco Bay. As a result of his injuries petitioner was treated at San Francisco General Hospital for approximately three months. Following his treatment, petitioner returned to Colombia where he presently resides.

Petitioner was born in Manizales, Colombia and signed his employment contract with Flota in Santa Marta, Colombia. The contract provides that it will be interpreted under Colombian law, and that the parties recognize the jurisdiction of the Colombian courts over any dispute which may arise under the contract. Colombian laws provide that petitioner is entitled to receive free medical care and treatment in Colombia for any injury received aboard the vessel.

The *Ciudad de Cali* is a registered vessel of Colombia and thereby flies the Colombian flag. All of the crew members aboard the vessel at the time of petitioner's injury were Colombian citizens and residents, with the exception of the electrician who was a Polish citizen. All of the other members of the crew had signed their employment contracts with Flota in Colombia, and had joined the vessel at the beginning of the subject voyage in Buenaventura, Colombia. At the time of petitioner's injury the vessel was on a voyage which began and ended in Buenaventura, Colombia.

Respondent Flota is a relatively large shipowning corporation with its corporate headquarters in Bogota, Colombia, where it maintains its base of operations. All of Flota's officers and managers reside in Colombia, and control over

all of its functions is centered in Colombia. Flota employs over 300 individuals in Bogota including its operational staff, financial consultants and accountants, corporate officers, long-term planning, research and development departments, its naval architect staff, and all other necessary support personnel.

At the time petitioner filed suit, respondent Flota was 80 percent owned by the Federation of Coffee Growers of Colombia, with the remaining 20 percent owned by the Central Bank of Ecuador. In 1979, Flota owned 29 vessels, 13 of which called at U.S. ports sometime during that year. Those 13 vessels also stopped at ports in Canada, Mexico and various South American countries.

In 1979, Flota also had approximately 50 other vessels under charter, or operated in conjunction with other shipowners. These 50 vessels, combined with the 29 vessels Flota owned, called at ports in countries all over the world.

In 1979, the *Ciudad de Cali* would normally call at 15 different ports during a voyage, only four of which were in the U.S. During its normal 72-day voyage to and from Colombia the vessel would only spend approximately six days in U.S. ports.

As a result of its operations in 1979, Flota grossed $93,493,984, but suffered a net loss of $9,210,859. It was impossible for Flota to determine whether a net gain or loss had been suffered specifically from calls at U.S. ports, in light of the fact that every voyage made by vessels calling at U.S. ports also called at ports in other countries.

As a general agent for Flota, Granco provides the necessary shoreside support to the vessels owned, chartered and otherwise operated by Flota. The profits and losses of

Granco are not reflected in Flota's records or accounts, nor does Granco own any stock in Flota.

There are two owners representatives under contract with Granco who assist in providing shoreside support for Flota's vessels. One is located in San Francisco and the other in New Orleans, and they service the ports on the West and Gulf coasts, respectively. These owners representatives deal with Granco with respect to such matters as payment of locally incurred charges. However, the owners representatives are in contact with Flota's headquarters in Colombia with respect to all operational matters. The practice of having owners representatives stationed in ports where vessels call is common among foreign shipowners, there being approximately 18 other foreign shipowners who have owners representatives in San Francisco.

Following discovery ordered by the District Court, respondents had moved to dismiss on the basis that United States law was not applicable, or in the alternative, on the basis of *forum non conveniens*. The District Court granted respondent's motion, and petitioner appealed. The Ninth Circuit Court of Appeals upheld the lower court in a majority decision filed on March 15, 1983, a concurring opinion filed on April 5, 1983 and in a subsequent order filed on April 25, 1983.

The Court of Appeals stated that petitioner had identified three factors which he asserted justified the application of the Jones Act or the General Maritime Law of the United States to this case. They were:

(1) The fact that plaintiff was injured while in U.S. waters;

(2) That Flota had substantial operational contacts in the United States; and

(3) That the litigation in which Flota has been a party in United States Courts was an indication of Flota's business relation and contact with this country.

The Ninth Circuit held that the fact that petitioner was injured in the United States was of little significance. It also held that evidence was uncontradicted that Flota's base of operations was in Bogota, Colombia. Neither Flota's gross earnings from operations, which only in part involve U.S. shipments, nor its advertising or other minimal contacts, established a base of operations in the United States. Finally, the Circuit Court concluded that the fact that Flota had been involved in litigation in this country was irrelevant.

After the Ninth Circuit had issued its opinions, petitioner advised the Ninth Circuit that the District Court had in fact concluded that no cause of action existed under the Jones Act or the General Maritime Law, and further that maintenance of jurisdiction was not proper under *forum non conveniens*. As a result, the Ninth Circuit agreed with petitioner that remand on the *forum non conveniens* issue was not necessary, and it then affirmed the District Court's order in total. Petitioner then proceeded to file his Petition with this Honorable Court.

THE ARGUMENT

NO CONFLICT EXISTS AMONG THE CIRCUIT COURTS IN DECIDING CASES OF THIS TYPE. THEIR DECISIONS MERELY REFLECT THE DIFFERENCE IN THE FACTS OF EACH CASE

Petitioner has stated that certiorari should be granted as different tests have been applied in determining whether

the Jones Act and the General Maritime Law of the United States applies in similar cases. Respondents respectfully disagree and submit that the Circuit Courts have consistently applied the factors which are to be considered in ruling on this question. The result has been the development of uniform law in this area which necessarily varies only to the extent of the difference in the facts of each case. The Ninth Circuit in this case had similarly considered all of the relevant factors and arrived at a proper conclusion.

This Court identified the eight factors to be considered in determining the choice of law question as: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the independent shipowner; (5) the place of contract; (6) the accessibility of the foreign forum; (7) the law of the forum; and (8) the base of operations of the shipowner. *Lauritzen v. Larson*, 345 U.S. 571, 583-91 (1952); *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970).

This Court has given the Circuit Courts guidance in weighing and evaluating the various contacts. The place of the wrongful act and the place of contract have been identified as less significant. *Lauritzen*, 345 U.S. at 583-84, 588-89. This Court has stated, however, that the law of the flag is of "cardinal importance" in determining choice of law, as it is the "most venerable and universal rule of maritime law". *Lauritzen*, 345 U.S. at 584.

This Court has also stated that the factors are not to be applied mechanically, nor are they inclusive of all factors which may be considered by the courts. *Rhoditis*, 398 U.S.

at 308-309. In response, the Circuit Courts have indeed concluded that the various factors will have varying degrees of merit depending upon the facts of each case. *Moncada v. Lamuria Shipping Corp.*, 491 F.2d 470, 472 (2nd Cir.) *cert. denied*, 417 U.S. 947 (1974); *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 85 (9th Cir. 1980), *cert. denied* 451 U.S. 920 (1981).

Petitioner has argued that the Ninth Circuit in this case applied a different standard than the one used by the Second Circuit in *Bartholomew v. Universe Tank Ship, Inc.*, 263 F.2d 437 (2nd Cir. 1959), *cert. denied* 359 U.S. 1000 (1959), the Fifth Circuit in its decision in *Fisher v. Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied* 454 U.S. 816 (1981), and the Eleventh Circuit in the case of *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983). Respondents respectfully submit that the holding of the Ninth Circuit in this case is in accord with the decisions of the other Circuits.

The Ninth Circuit properly weighed the factors to be considered in determining whether the Jones Act or the General Maritime Law was applicable. Having found no substantial contacts, the Ninth Circuit affirmed the action of the District Court in dismissing this case. Had the other Circuits been asked to evaluate the same facts, they similarly would have concluded that U.S. law did not apply.

In *Bartholomew*, the Second Circuit recognized that it was to ascertain, weigh and value the points of contact between the transaction and the governments whose competing laws were involved. 263 F.2d at 439. The Second Circuit concluded, rightfully so, that the facts in that case warranted the application of U.S. law. In *Bartholomew*,

U.S. citizens owned all of the stock of the shipowning corporation. The officers of that corporation were U.S. citizens, and its principal place of business, i.e., its base of operations, was in the United States. The plaintiff-seaman had signed his articles in the United States and was to sail on a vessel whose voyage began and ended in the United States. In addition, plaintiff was deemed to be a resident and domiciliary of the United States, and had been injured in the United States. Obviously, a significant number of substantial contacts were present which justified application of the Jones Act.

In this action the Ninth Circuit was presented with very different facts. The only contact favoring application of U.S. law was the place of the alleged wrongful act, i.e., the petitioner was injured while in U.S. waters. Contrary to the facts in *Bartholomew,* Flota's ultimate owners are Colombian and Ecuadorian, not U.S. citizens. Flota's base of operations is clearly centered in Bogota, Colombia where over 300 individuals are employed in the daily operations of the company. Petitioner is a Colombian citizen, who resides there while receiving benefits under Colombian law. In addition, the voyage during which petitioner was injured began and ended in Colombia. There simply are no substantial factors which justify application of United States law to this case.

The facts before the Fifth Circuit in *Fisher v. Agios Nicholaos V,* 628 F.2d 308 (5th Cir. 1980), *cert. denied* 454 U.S. 816 (1981), were also very different from the facts in this case. The Fifth Circuit found that at the time of the foreign seaman's injury U.S. contacts were the source of all of the shipowner's revenue, and the entire

service of the vessel. This was due to the fact that the foreign shipowner had just begun operations shortly before the seaman's injury and only owned one vessel. The only business venture of that shipowner prior to the injury was a voyage to and from the United States. As a result, the Fifth Circuit concluded that at the time of the seaman's injury the shipowner's base of operations was in the United States.

In addition, the seaman in *Fisher* had made a good faith claim for wrongfully withheld wages under 46 U.S.C. § 596. Having jurisdiction over part of the controversy, it was entirely proper for the District Court to take jurisdiction over the entire matter thereby avoiding multiplicity of suits. *Gkiafis v. S.S. Yiosonas*, 387 F.2d 460 (4th Cir. 1967).

Contrary to the facts in the *Fisher* case, Flota earns but a small percentage of its revenue from calls at U.S. ports. Flota's base of operations is in Colombia where all of its management and operational decisions are made. In addition, Flota's operations are truly world wide in scope. It owned, chartered or operated 79 vessels in 1979, only 13 of which ever called at U.S. ports. Finally, petitioner did not make a wage claim under 46 U.S.C. § 596, which would have required the District Court to exercise jurisdiction.

Petitioner has also alleged that the decision of the Eleventh Circuit in *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192 (11th Cir. 1983), is contrary to the holding of the Ninth Circuit in this case. In *Szumlicz*, the seven factors identified in *Lauritzen* did not favor application of U.S. law. However, the Eleventh Circuit did find

that shipowner's base of operations was in the United States and relying on *Rhoditis* affirmed the District Court's conclusion that the Jones Act applied.

The Eleventh Circuit noted that the vessel in question was employed in voyages which began and ended in Florida, while calling at other U.S. ports. The shipowner also maintain "offices" in Florida and New York, in addition to employing local agents. Shipowner also employed a physician in Florida to treat its seaman.

Contrary to the facts in *Szumlicz*, respondent Flota's vessel was on a voyage which began and ended in Colombia. Flota does not maintain "offices" in the United States, but rather has contracted with a general agent, Granco, an independent corporation, which, with the assistance of two owners representatives, services local needs of Flota's vessels while in U.S. ports. Further, contrary to *Szumlicz*, Flota does not employ physicians in the United States.

It is clear from the opinion in *Szumlicz* that the Eleventh Circuit would not have applied U.S. law to the facts of this case. It cited with approval the decision in *Volyrakis v. M/V Isabelle*, 668 F.2d 863 (5th Cir. 1982), where the *Lauritzen* factors strongly favored application of foreign law, where the sole factor favoring application of United States law was the place of the wrongful act, and where shipowner had no substantial base of operations in the U.S. On these facts the Fifth Circuit concluded that U.S. law would not apply. The exact same facts were presented to the Ninth Circuit in this case, and it similarly concluded that U.S. law should not apply. The Eleventh Circuit

would have apparently come to the same conclusion. *Szumlicz*, 698 F.2d at 1195.

In summary, an analysis of the other Circuit Court cases cited by petitioner has not demonstrated any discrepancy between the Ninth Circuit's opinion here and the decisions in other Circuits. The Ninth Circuit properly evaluated and weighed the facts looking for substantial contacts. Having found none which would require the exercise of jurisdiction, the Ninth Circuit affirmed the District Court's dismissal.

IT WAS PROPER FOR THE NINTH CIRCUIT TO CONCLUDE THAT FLOTA DID NOT HAVE A SUBSTANTIAL BASE OF OPERATIONS IN THE UNITED STATES

The Ninth Circuit had determined that the number of contacts that Flota had with the United States, did not constitute a base of operations in the United States. In so concluding, the Ninth Circuit emphasized that Flota's actual base of operation was in Bogota, Colombia where all its officers and managers resided, where all its business decisions were made, and from where its vessels began and ended their voyages.

The Ninth Circuit stated that Flota's vessels did gross an "impressive" amount of income in calling on ports of the United States. In doing so, the Ninth Circuit was referring to the $93,483,984 that Flota grossed in income from ships which called at U.S. ports in 1979. However, respondents wish to make clear that the Ninth Circuit was advised that those same vessels also called at ports in Canada, Mexico and South America. The exact amount of income from U.S. operations alone could, therefore, not be broken down by

Flota. Further, Flota in fact suffered a net loss from the operations of those vessels in the amount of $9,210,859. It is, therefore, likely that Flota suffered a net loss from its "U.S. operations".

The Ninth Circuit pointed out that assistance rendered to Flota by its U.S. agent, or its owners representatives, was of no significance. All shipowners must employ local agents to assist them in the operations of their vessels in other countries. *Merren v. A/S Borgestad*, 519 F.2d 82 (5th Cir. 1975); *Manlugon v. A/S Facto*, 419 F.Supp. 550 (S.D. N.Y. 1976). As a result, the employment of Granco and owners representatives should not be considered to constitute a base of operations.

In response to petitioner's argument, the Ninth Circuit also concluded that the fact that Flota advertised in U.S. publications and is listed in San Francisco telephone directories did not establish a base of operations. All foreign shipowners must advertise in order to compete with each other, and U.S. flag shipowners. Such actions are not substantial contacts with the United States, especially when compared with the obvious base of operations that Flota maintains in Bogota, Colombia where its day-to-day operations are conducted.

Petitioner also suggested to the Ninth Circuit that the fact that Flota had been involved in litigation in the United States was significant in determining whether it maintained a base of operations here. Respondents agree with petitioner that this Court in *Rhoditis* held that the factors listed in that case and *Lauritzen* were not intended to be exhaustive. Respondents submit, however, that the number of times

that Flota has been involved in litigation in the U.S. is not a substantial contact.

In 17 of the cases cited by petitioner on page 4 of his Petition, Flota was a defendant in actions brought under the Longshoreman & Harborworkers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, which has an entirely dissimilar standard for determining jurisdiction. In one other case, Flota had been sued for alleged failure to pay wharfage. Thus, in these cases Flota was an unwilling participant in the litigation.

In three other cases, Flota petitioned to review an order of the Federal Maritime Commission. Flota could not have obtained jurisdiction over the FMC in any forum other than U.S. courts.

In another case cited by the petitioner, Flota had filed a petition for limitation of liability following a collision of one of its vessels. This Court has specifically stated that the fact that a foreign shipowner files a petition to limit liability in U.S. courts, is not a basis upon which to conclude that the foreign shipowner is subject to suit here by a foreign seaman.

> "Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not. Furthermore, this application of the limitation on liability brought our practice into harmony with that of all maritime nations, while the application of the Jones Act here advocated would bring us into conflict with the maritime world." *Lauritzen, supra,* 345 U.S. at 592.

Jurisdiction can be obtained over foreign shipowners in a number of situations dependent upon the point of law involved. In addition, foreign shipowners are often forced to litigate in the U.S. in order to resolve disputes with government entities or U.S. citizens. Such litigation should not be considered a basis for the application of the Jones Act or the General Maritime Law as it has no connection with the cause of action alleged by the plaintiff/seaman.

This Court has given specific guidelines as to what shall constitute a basis for the application of the Jones Act and the General Maritime Law to a suit brought by a foreign seaman. The fact remains that none of the significant factors identified by this Court in *Lauritzen* and *Rhoditis* are present in this case.

CONCLUSION

The Circuit Courts have evaluated, counted, weighed and determined that certain of the *Lauritzen/Rhoditis* contacts predominate over others depending on the facts of the case. The *Lauritzen/Rhoditis* factors are obviously still viable and provide the lower courts with sufficient guidance to enable them to arrive at the correct decision despite various and divergent factual situations. However, petitioner had in effect asked the Ninth Circuit to ignore the *Lauritzen/Rhoditis* factors.

Petitioner had asked the Ninth Circuit to rule that any amount of business activity performed by a foreign shipowner in the United States was to be considered significant regardless of the amount of shipowner's business conducted elsewhere, and regardless of where shipowner maintains its base of operations. Simply doing business in the United

States should not result in the application of the Jones Act or the General Maritime Law to disputes of this type. Every foreign shipowner whose vessel calls at U.S. ports does business in the United States, as the presence of the vessel requires that shipowner hire local agents, appoint local owners representatives, advertise its presence, and solicit freight. To hold that the United States law should apply to every foreign shipowner whose vessels call here would be directly contrary to the tenets of *Lauritzen/Rhoditis* which sought to define the limits of our jurisdiction and the domain which each maritime nation may claim as its own. To reduce the applicable standard to one of simply doing business in the United States, as petitioner has suggested, would make our already overcrowded dockets "even more attractive" to foreigners whose internal disputes are of no concern to U.S. citizens and U.S. courts. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981).

The Ninth Circuit in this case has issued an opinion consistent with its decision in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied*. 451 U.S. 920 (1981). In *Phillips* the Ninth Circuit stated that the *Lauritzen* factors "should be applied with sensitivity to the national interests that may be served by the assertion of American maritime law in a particular case." *Phillips*, 632 F.2d at 85.

Respondents respectfully submit that there is no national interest in this suit brought by Rodriguez. Colombia is truly the only nation that has a significant interest in the outcome of this dispute.

The Ninth Circuit considered the fact that the vessel in question was flying a Colombian flag, that it was manned by

a Colombian crew, that the plaintiff was a Colombian citizen and resident, that the potential liability witnesses were all Colombian citizens, that the employment contract was executed in Colombia, that the contract provided for application of Colombian law and that Flota is a Colombian corporation whose contacts with the United States were limited to those required of any ship which calls at U.S. ports. In light of all these facts, the Ninth Circuit reached the proper conclusion. As a result, this Court should decline to issue a Writ of Certiorari.

Dated: June 6, 1983.

Respectfully submitted,

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